

**DATUK SERI ANWAR IBRAHIM v. MOHD KHAIRUL AZAM
ABDUL AZIZ & ANOTHER APPEAL**

COURT OF APPEAL, PUTRAJAYA
HAS ZANAH MEHAT JCA
MOHD SOFIAN ABD RAZAK JCA
LEE HENG CHEONG JCA

[CIVIL APPEAL NOS: W-01(IM)(NCVC)-479-09-2020
& W-01(IM)(NCVC)-486-09-2020]
9 JANUARY 2023
[2023] CLJ (JT1)

Abstract – *In the matters of granting of pardon, where the Yang di-Pertuan Agong ('YDPA') acts on the advice of the Pardons Board, the long and consistent established position of the law in Malaysia is that the prerogative power of the YDPA under art. 42 of the Federal Constitution is non-justiciable. An advocate and solicitor, who seeks a declaration from the court to invalidate the pardon, does not enjoy any higher rights or privilege than ordinary people, and his failure to demonstrate that he had suffered some special damage by the granting of the pardon showed he had no locus standi to challenge the pardon. There is thus no basis to impugn the YDPA's exercise of his exclusive power to grant pardon, as the prerogative of mercy can only be exercised by the YDPA and is not caught within the supervisory jurisdiction of the courts.*

CIVIL PROCEDURE: *Action – Striking out – Action for declaration from court to invalidate full pardon by Yang di-Pertuan Agong – Whether party seeking declaration had interest in subject matter of declarations sought – Whether there was infringement of private or public rights or interest resulting from pardon granted – Locus standi – Whether arose to bring and maintain action – Whether there was cause of action – Whether clemency process and royal prerogative of mercy justiciable – Triable issues – Whether arose – Whether action an abuse of process and ought to be struck out – Rules of Court 2012, O. 18 r. 19*

CONSTITUTIONAL LAW: *Clemency – Powers of – Exercise of power of pardon by Yang di-Pertuan Agong ('YDPA') – Whether power to grant pardons can only be exercised by YDPA personally and exclusively – Whether justiciable – Federal Constitution, art. 42*

These appeals were heard jointly as they relate to the same decision of the High Court Judge ('HCJ'). In the High Court, the plaintiff ('respondent') commenced an action by writ against the second defendant ('first appellant') and the first defendant ('second appellant') seeking the following declarations

- A (i) that the second appellant, the Pardons Board, that convened and advised the Yang Di-Pertuan Agong ('YDPA') in respect of the full pardon granted to the first appellant ('pardon') was not properly constituted rendering the said sitting and advice given by the second appellant null and void *ab initio*;
- B (ii) that the pardon granted was invalid, null and void; (iii) alternatively, that the effect of the said pardon was limited to the sentencing only and did not set aside the conviction made against the first appellant. The background facts were that the first appellant was charged for an offence under s. 377B of the Penal Code and was convicted and sentenced to five years' imprisonment term. On 16 May 2018, the first appellant received the pardon. The first appellant filed an application to strike out the respondent's claim under O. 18 r. 19 of the Rules of Court 2012 ('ROC') on the grounds that, *inter alia*, (i) the subject matter of this action was non-justiciable; (ii) the composition of the first appellant was valid; (iii) the respondent had no *locus standi* to bring the suit; (iv) the discretion of the YDPA was non-justiciable; (v) the court had no power to grant the relief sought, the issue was hypothetical and academic in nature; (vi) there was no cause of action; and (vii) the claim was frivolous, vexatious and an abuse of the process of court.
- C The second appellant also filed an application to strike out the respondent's claim under O. 18 r. 19 of the ROC on the grounds that, *inter alia*, (i) the subject matter of the respondent's claim was non-justiciable; (ii) the respondent had no *locus standi*; (iii) the respondent's claim was an abuse of court process; (iv) the second appellant was validly constituted and the proceedings of the second appellant was carried out regularly and in accordance with the law; and (v) the granting of the pardon was the sole discretion of the YDPA. The HCJ dismissed both the striking out applications. Dissatisfied, both the appellants appealed. The first appellant's contentions were: (i) whether the clemency process and the royal prerogative of mercy were justiciable; (ii) whether the respondent had the necessary *locus standi* to bring and maintain the action; (iii) whether the respondent had a cause of action and if so, whether the action by writ was the correct mode; (iv) whether the respondent who had no interest in the subject matter of the declarations sought, was entitled to seek the relief claimed; and (v) whether the respondent's action was an abuse of process and ought to be struck out.
- D The second appellant, in turn, contended that the respondent's action was frivolous and vexatious and an abuse of the court's process on the following grounds (i) that the second appellant was lawfully and properly constituted in accordance with art. 42 of the Federal Constitution ('FC'); (ii) that the sitting of the second appellant to deliberate on the first appellant's pardon was carried out in accordance with art. 42 of the FC; and (iii) that the pardon granted pursuant to art. 42 of the FC was the prerogative of the YDPA. The respondent, in directly challenging the pardon granted to the first appellant, contended: (i) that the second appellant, being the Pardons Board, was not properly established and thus, the advice rendered to the YDPA was
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defective and void; (ii) that the YDPA's action was based on the wrong advice by the second appellant to the YDPA. The respondent contended that the advice was wrong because the FC does not provide for a full pardon, in that, a pardon could not set aside a conviction; (iii) that he had an express and implied cause of action for constitutional rights by virtue of being a Malaysian citizen; (iv) that the composition of the second appellant was not proper; (v) that there was an issue of the constitutionality/legality of the pardon given to the first appellant; (vi) that the subject matter of the respondent's action was justiciable; and (vii) that the respondent had *locus standi* to sue.

Held (allowing appeals)

Per Lee Heng Cheong JCA delivering the judgment of the court:

- (1) The respondent's claim did not disclose a cause of action against the first appellant and/or the second appellant, the Pardons Board. The respondent had not pleaded any infringement of private or public rights or interest or special injury resulting from the pardon granted to the first appellant. The respondent was clearly a busybody, a troublemaker and was not entitled to the declarations sought. Simply being a Malaysian citizen and a lawyer did not accord him the requisite right to bring this frivolous suit. It was clearly an abuse of court process and ought to have been struck out. (para 19)
- (2) There is nothing in art. 42 of the FC which curtails or limits the powers of the YDPA to grant the pardon to the first appellant. If the intention is to limit it to sentence only, it should have been clearly stated in the FC. It is not for the court to add any words. The plain words of the relevant article of the FC do not exclude the granting of a pardon in respect of a conviction. A perusal of art. 42 of the FC showed that the powers of mercy and clemency of the YDPA are extensive and encompasses both conviction and sentence. Under reg. 113 of the Prisons Regulations 2000, a person who has been convicted has the right to petition the YDPA for a pardon against conviction and sentence. Further, arts. 48(1) and 25(1)(c) of the FC refer to a 'free pardon.' (paras 21 & 22)
- (3) The clemency process and the granting of the pardon to the first appellant does not in way or manner affect the respondent's personal or legal or any rights or interests. Thus, the respondent had no standing or right to question the clemency process or the advice given to the YDPA or the granting of the pardon to the first appellant. The respondent, being an advocate and solicitor, does not enjoy any higher right or privileges than ordinary people in this case. There is nothing in the FC which imposes a duty on the second appellant or the YDPA to consult the respondent or accept his views. For the respondent to found an action

- A such as this, he must demonstrate that he had suffered some special damage by the granting of the pardon and that he had a genuine private interest to protect. The respondent had failed wholly in this respect. Accordingly, he had no *locus standi* to challenge the pardon granted to the first appellant. It was the first appellant's personal rights and liberties that would be infringed if the declarations were granted. (paras 28-30)
- B
- (4) The long and consistent established position of the law in Malaysia is that the prerogative power of the YDPA under art. 42 of the FC is non-justiciable. The HCJ had blatantly ignored binding precedents when he held that the granting of pardon in Malaysia was not a royal prerogative and that it was definitely justiciable. The HCJ was clearly wrong to ignore the doctrine of *stare decisis*. There was no reason and basis for him to depart from the long line of established binding precedents. The power to grant pardons can only be exercised by the YDPA personally and exclusively and such exercise is not justiciable.
- C
- D There was no basis for the respondent to impugn the YDPA's exercise of his exclusive power to grant the pardon. There was no evidence adduced that in granting the pardon to the first appellant, the YDPA acted beyond his statutory powers or in bad faith. (paras 37, 46, 48 & 49)
- E (5) There were no serious triable issues to be tried in this case. The respondent's claim was frivolous and an abuse of the process of the court. There were merits in the first and second appellants' appeals. The prerogative of mercy can only be exercised by the YDPA and is not caught within the supervisory jurisdiction of the courts. Thus, the respondent's suit was clearly unmaintainable and an abuse of process.
- F (paras 54 & 55)

Case(s) referred to:

- Abdul Razak Ahmad v. Majlis Bandaraya Johor Bahru* [1995] 4 CLJ 339 HC (*refd*)
Chiew Thiam Guan & Ors v. Superintendent Of Pudu Prisons & Anor [1983] 1 CLJ 278;
[1983] CLJ (Rep) 92 FC (*refd*)
- G *Council Of Civil Service Unions & Others v. Minister For The Civil Service* [1984] 3 All ER 935 (*refd*)
Government Of Malaysia v. Lim Kit Siang & Another Case [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63 SC (*refd*)
JB Jeyaratnam v. The Attorney General [1990] 2 CLJ 477; [1990] 3 CLJ (Rep) 643 (*refd*)
- H *Juraimi Husin v. Pardons Board Of State Of Pahang & Ors* [2002] 4 CLJ 529 FC (*refd*)
Karpal Singh v. Sultan Of Selangor [1987] 2 CLJ 342; [1987] CLJ (Rep) 686 HC (*refd*)
Lee Ngan Fong & Ors v. Gan Bo Tan & Ors [2011] 1 LNS 770 CA (*refd*)
Letitia Bosman v. PP & Other Appeals [2020] 8 CLJ 147 FC (*refd*)
Lim Cho Hock v. Government Of The State Of Perak, Menteri Besar, State Of Perak And President, Municipality Of Ipoh [1980] 1 LNS 43 HC (*refd*)
- I *Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd* [2006] 3 CLJ 177 FC (*refd*)
Nik Hassan Nik Hussin & Anor v. PP [1947] 1 LNS 74 HC (*refd*)

- Periasamy Sinnappan v. PP* [1996] 3 CLJ 187 CA (*refd*) A
- PP v. Soon Seng Sia Heng & Other Cases* [1979] 1 LNS 81 FC (*refd*)
- Sim Kie Chon v. Superintendent Of Pudu Prisons & Ors* [1985] 2 CLJ 449; [1985] CLJ (Rep) 293 SC (*refd*)
- Superintendent Of Pudu Prison & Ors v. Sim Kie Chon* [1986] 1 CLJ 548; [1986] CLJ (Rep) 256 SC (*refd*)
- Tan Wei Hong & Ors v. Malaysia Airlines Bhd & Other Appeals* [2018] 9 CLJ 425 FC (*refd*) B
- YAM Raja Dato' Seri Hj Izzuddin Iskandar Shah Ibni Almarhum Sultan Idris A'fifullah Shah v. Dewan Negara Perak, Negeri Perak & Anor* [2010] 2 CLJ 767 HC (*refd*)
- Yong Vui Kong v. Attorney General* [2011] 1 SLR 1 (*refd*)
- Legislation referred to:** C
- Federal Constitution, arts. 8, 25(1)(c), 42(5), (9), 48(1), 181
- Penal Code, s. 377B
- Prisons Regulations 2000, reg. 113
- Rules of Court 2012, O. 18 r. 19(1)
- (Civil Appeal No: W-01(IM)(NCvC)-479-09-2020)
- For the appellant - Gopal Sri Ram, Leela J Jesuthasan & Yasmeen Soh Sha-Nisse; D
M/s Chambers of Leela J
- For the respondent - Mohamed Haniff Khatri Abdullah, M Reza Hassan, Fatin Kamalia Mat Nawi & Muna Farhana Zainuddin; M/s Raja Riza & Assocs
- (Civil Appeal No: W-01(IM)(NCvC)-486-09-2020)
- For the appellant - Suzana Atan & Narkunavathy Sundareson; SFCs E
- For the respondent - Mohamed Haniff Khatri Abdullah, M Reza Hassan, Fatin Kamalia Mat Nawi & Muna Farhana Zainuddin; M/s Raja Riza & Assocs
- [Editor's note: For the High Court judgment, please see Mohd Khairul Azam Abdul Aziz v. Lembaga Pengampunan Wilayah Persekutuan & Anor [2021] 1 CLJ 94 (overruled).]
- Reported by Suhainah Wahiduddin F

JUDGMENT

Lee Heng Cheong JCA:

Introduction

[1] The above two appeals are heard jointly as they relate to the same decision of the learned High Court Judge. In the High Court, Mohd Khairul Azam bin Abdul Aziz, the plaintiff who is the respondent in both appeals here ("respondent") commenced an action by writ on 26 February 2020 against the second defendant, Datuk Seri Anwar bin Ibrahim who is the appellant in Appeal No. W-01(IM)(NCVC)-479-09-2020 ("Appeal 479") ("first appellant") and the first defendant, the Pardons Board of Wilayah Persekutuan, which is the appellant in Appeal No. W-01(IM)(NCVC)-486-09-2020 ("Appeal 486") ("the second appellant") seeking the following declarations:

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- A (i) a declaration that the Pardons Board, the second appellant that convened and advised the Yang Di-Pertuan Agong (“YDPA”) on 16 May 2018 in respect of the full pardon granted to the first appellant (“Pardon”) was not properly constituted rendering the said sitting and advice given by the second appellant, the Pardons Board, null and void *ab initio*;
- B (ii) a declaration that the Pardon granted, is invalid, null and void;
- (iii) alternatively, a declaration that the effect of the said Pardon is limited to the sentencing only and does not set aside the conviction made against the first appellant.
- C [2] On 2 June 2020, the first appellant had filed an application to strike out the respondent’s claim under O. 18 r. 19 Rules of Court 2012 (“ROC”) (encl. 21) on the grounds that, *inter alia*:
- (i) that the subject matter of this action is non-justiciable;
- D (ii) that the composition of the second appellant is valid;
- (iii) that the respondent has no *locus standi* to bring the suit;
- (iv) that the discretion of YDPA is non-justiciable;
- (v) that the court has no power to grant the relief sought for, the issue is hypothetical and academic in nature;
- E (vi) that there is no cause of action; and
- (vii) that the claim is frivolous, vexatious and an abuse of the process of court.
- F [3] On 13 May 2020, the second appellant also filed an application to strike out the respondent’s claim under O. 18 r. 19 ROC 2012 (encl. 13) on the grounds that, *inter alia*:
- (i) that the subject matter of respondent’s claim is non-justiciable;
- G (ii) that the respondent has no *locus standi*;
- (iii) that the respondent’s claim is an abuse of court process;
- (iv) that the second appellant was validly constituted and the proceedings of the second appellant was carried out regularly and in accordance with the law; and
- H (v) further the granting of the pardon is the sole discretion of the YDPA.
- I [4] The learned High Court Judge dismissed both striking out applications. Dissatisfied with the decisions of the learned High Court Judge, both the appellants had filed separate appeals to the Court of Appeal.

[5] We heard both the two appeals on 21 September 2021 and we unanimously allowed the first and second appellants' appeals and our grounds are as follows. A

[6] Parties shall be referred to their respective capacities before us.

Background Facts B

[7] The first appellant was charged for an offence under s. 377B of the Penal Code. He was acquitted by the High Court. However, on appeal by the prosecution, the first appellant was convicted and sentenced to a five years' imprisonment term. The Federal Court, on 10 February 2015, upheld the conviction and sentence. C

[8] On 16 May 2018, the first appellant received the Pardon which reads as follows. The "Perintah Pengampunan Penuh dan Pembebasan Serta Merta" reads as follows:

MAKA, OLEH YANG DEMIKIAN, Beta Sultan Muhammad V, D
Kebawah Duli Yang Maha Mulia Seri Paduka Baginda Yang di Pertuan
Agong XV, pada menjalankan kuasa yang terletak pada Beta oleh
Perkara 42 Perlembagaan Persekutuan dan semua kuasa lain yang
membolehkan bagi maksud itu ADALAH DENGAN INI
MEMERINTAHKAN supaya DATO' SERI ANWAR BIN IBRAHIM
diberi **pengampunan sepenuhnya dan dianggap sebagai seorang yang** E
tidak pernah melakukan apa-apa kesalahan serta diberi pembebasan
serta merta. (emphasis added)

The Findings Of The Learned High Court Judge

[9] In dismissing the first and second appellants' said applications to strike out the respondent's claim, the learned High Court Judge *inter alia* held as follows: F

- (i) that the respondent being a member of the public has a right to question the Attorney General ("AG") on the advice given by the second appellant resulting in the full pardon of the first appellant. Further, the respondent is not only an ordinary member of the public but also a lawyer and therefore has a higher right than an ordinary public to question the second appellant; G
- (ii) that there was a legal delegation of power of the AG's powers authorised by art. 42 cl. 5 of the Federal Constitution; H
- (iii) that even though the Minister of Federal Territories was not appointed on the date of proceedings of the second appellant at the material time, is of no consequence as the court accepts that under the Perintah Menteri-Menteri Kerajaan Persekutuan 2018 [P.U.(A) 125/2018] the Prime Minister ("PM") was the Minister in charge of the Federal Territory at the material time and the PM was present during the I

- A material proceedings. Thus, there is no merit in the respondent's contention that there is a defect in the composition of the second appellant on 16 May 2018;
- (iv) that the role of the AG is not only limited to be present during the proceedings of the second appellant and that an even more important
- B role of the AG is to give a written opinion on the Pardon. Article 42 cl. 9 of the Federal Constitution states as follows:
- Before tendering their advice on any matter a Pardons Board shall consider any written opinion which the Attorney General may have delivered thereon.
- C (v) that the question that arises in this case is whether there was a written opinion given by the Attorney General in this case and whether the giving of written opinion be delegated;
- (vi) on matter of pardon where the YDPA acts on the advice of the
- D Pardons Board or the second appellant here and AG, whether this power is justiciable;
- (vii) that the granting of pardon in Malaysia cannot be regarded as royal pardon unlike in country like England where the pardon by the Monarch is not subject to any restriction and given as a royal
- E prerogative;
- (viii) that the granting of pardon cannot be ruled as not justiciable just because it is exercised by the august and high office of the YDPA. It will be a dereliction of duty on the part of the court and a breach of the Federal Constitution to rule so. In short, this court rules the
- F granting of pardon by the YDPA is definitely justiciable;
- (ix) that this suit has raised a number of triable issues, the most significant being the validity and correctness of the advice given by the second appellant resulting in the granting of the Pardon;
- G (x) that the court is empowered to determine whether the advice given justified the Pardon and an important reason for doing so is to prevent a breach of art. 8 of the Federal Constitution which stipulates equality before the law;
- H (xi) that there is an important issue whether the Executive Branch of the Government can encroach into the powers of the Judiciary, by setting aside a conviction of an accused who has been convicted after the full due process of the law;
- (xii) that there are triable issues and live issues that need to be determined
- I and cannot be regarded as merely academic or hypothetical issues. Further the first appellant has not completed his full term of imprisonment for which he was sentenced with and therefore the court is still in a position to grant the declarations sought by the respondent;

- (xiii) that the normal mode of challenging the exercise of executive powers is by way of judicial review. However, the courts have ruled in a number of cases that in a case where the performance of public duty affect private rights the actions can be begun by a writ; A
- (xiv) that the appropriate mode of initiating this proceeding is by way of writ as it involves determination of issues by way of oral evidence of witnesses who can be subjected to cross-examination; B
- (xv) that the respondent has a *locus standi* to file this claim by way of writ to obtain a declaration on the validity of the full pardon granted to the first appellant. There are triable issues which needs determination of court after a full trial; and C
- (xvi) that this is not a case which can be summarily dismissed under O. 18 r. 19 ROC 2012. A full trial with witnesses is necessary for the determination of the issues emanating from this suit. D

The First Appellant's Contentions

[10] Before us, the first appellant contended as follows:

- (i) whether the clemency process and the royal prerogative of mercy are justiciable?;
- (ii) whether the respondent has the necessary *locus standi* to bring and maintain the action?; E
- (iii) whether the respondent has a cause of action and if so, whether action by writ was the correct mode?;
- (iv) whether the respondent who has no interest in the subject matter of the declarations sought, is entitled to seek the relief claimed?; and F
- (v) whether the respondent's action is an abuse of process and ought to be struck out?

The Second Appellant's Contentions

[11] The second appellant in turn contended that the respondent's action is frivolous and vexatious and an abuse of the court's process based on the following grounds:

- (i) that the second appellant was lawfully and properly constituted in accordance with art. 42 of the Federal Constitution; H
- (ii) that the sitting of the second appellant held on 16 May 2018 to deliberate on the first appellant's Pardon was carried out in accordance with art. 42 of the Federal Constitution; and
- (iii) that the Pardon granted pursuant to art. 42 of the Federal Constitution is the prerogative of the YDPA. I

A The Respondent's Contentions

[12] The respondent, before us, in directly challenging the Pardon granted to the first appellant, contends as follows:

- B** (i) that the second appellant, being the Pardons Board was not properly established and thus, the advice rendered to the YDPA is defective and void;
- (ii) that the YDPA's action is based on the wrong advice by the second appellant to the YDPA. The respondent contended that the advice is wrong because the Federal Constitution does not provide for a full pardon, in that a pardon cannot set aside a conviction;
- C** (iii) that he has an express and implied cause of action for constitutional rights by virtue of being a Malaysian citizen;
- (iv) that the composition of the second appellant is not proper;
- D** (v) that there is an issue of the constitutionality/legality of the Pardon given to the first appellant;
- (vi) that the subject matter of the respondent's action is justiciable; and
- (vii) that the respondent has *locus standi* to sue.

E Duty Of An Appellate Court

[13] The law on striking out under O. 18 r. 19(1) of the ROC 2012 is clear. A case may only be struck out by the court if it is satisfied that the claim is on the face of it "obviously unsustainable".

- F** [14] In *Tan Wei Hong & Ors v. Malaysia Airlines Bhd & Other Appeals* [2018] 9 CLJ 425, the Federal Court at pp. 435, 436, 444 and 447 at paras. [16, 17, 19, 53, 63 and 64], held *inter alia* that:

- G** [16] The principle for striking out of pleadings pursuant to O. 18 r. 19 of the ROC is well settled. *It is applicable only in a plain and obvious case or where a claim is, on the face of it, obviously unsustainable* (see: *Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd* [1993] 4 CLJ 7 SC; *Hubbuck & Sons Ltd v. Wilkinson, Heywood & Giard Ltd* [1899] 1 QB 86; *Attorney General of the Duchy of Lancaster v. London and North Western Railway Company* [1892] 3 Ch 274).

- H** [17] The tests for striking out application under O. 18 r. 19 of the ROC, as adopted by the Supreme Court in *Bandar Builder* (*supra*) are, *inter alia*, as follows:

- (a) *it is only in plain and obvious cases that recourse should be had to the summary process under the rule;*
- I** (b) *this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it obviously unsustainable;*

- (c) *it cannot be exercised by a minute examination of the documents and facts of the case in order to see whether the party has a cause of action or a defence;* A
- (d) *if there is a point of law which requires serious discussion, an objection should be taken on the pleadings and the point set down for argument under O. 33 r. 3 of the ROC; and* B
- (e) *the court must be satisfied that there is no reasonable cause of action or that the claims are frivolous or vexatious or that the defences raised are not arguable.*
- ...
- [19] The basic test for striking out as laid down by the Supreme Court in *Bandar Builder (supra)* is that *the claim on the face of it must be 'obviously unsustainable'*. The stress is not only on the word 'unsustainable' but also on the word 'obviously', *ie, the degree of unsustainability must appear on the face of the statement of claim without having to go into a lengthy and mature consideration in detail. If one has to go into a lengthy detailed argument and mature consideration of the issues of law and/or fact, then the matter is not appropriate to be struck out summarily. It must be determined at the trial.* C D
- ...
- ...
- [53] The Court of Appeal concluded that the factual issues, particularly regarding the extent of the statutory duties of the third defendant, the issue of whether the third defendant had carried out his duties in the circumstances of the case and the applicability of the doctrine of *res ipsa loquitur* as pleaded by the plaintiffs, *required close examination by the court and could only be resolved after careful examination of the evidence from both sides which the court could not embark upon at the preliminary stage of a striking out application. These issues were triable issues that needed to be decided and determined at trial.* E F
- ...
- ...
- [63] We find support for the above proposition in the words of Lord Browne-Wilkinson in the case of *Barrett v. Enfield Borough Council (supra)* who had expressed his view that *"... in an area of the law which was uncertain and developing (such as the circumstances in which a person can be held liable in negligence for the exercise of a statutory duty or power) it is not normally appropriate to strike out. In my judgment, it is of great importance that such development should be on the basis of actual facts found at trial not on hypothetical facts assumed (possibly wrongly) to be true for the purpose of the strike out.* G H

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- A [64] *We are also of the view that in dealing with an application for striking out, the court must exercise great care and caution, bearing in mind that the court must not drive away any litigant however weak his case may be from the seat of justice* (see: *Lee Nyan Choi v. Voon Moon* [1978] 1 LNS 94; [1979] 2 MLJ 28). On the face of the pleadings against the third defendant, the plaintiffs' claim is not obviously unsustainable. *There are triable issues that need to be fully argued at trial. This is a case where the court is not in a position to embark on a minute examination of the documents and the facts of the case at this preliminary stage of striking out application. That is solely reserved for the trial judge.* (emphasis added)
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Our Analysis And Conclusion

- C [15] Bearing the above guidance and principles in mind, we will proceed to consider the two appeals.

Any Cause Of Action?

- D [16] The first and second appellants contended that the respondent must have a cause of action before he can claim a relief. Guidance can be found in *Government Of Malaysia v. Lim Kit Siang & Another Case* [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63; [1988] 2 MLJ 12, where the court held that a cause of action was as follows:

- E A statement of facts alleging that the plaintiff's right either at law or by statute, has, in some way or another, been adversely affected or prejudiced by the act of the defendant in an action. Lord Diplock in *Letang v. Cooper* at p. 242 defined 'a cause of action' to mean a factual situation, the existence of which entitles one person to obtain from the court a remedy against another person. In my view the factual situation spoken of by Lord Diplock must consist of a statement alleging that, first, the respondent/plaintiff has a right either at law or by statute and that,
- F secondly, such right has been affected or prejudicated by the appellant/defendant's act.

- G [17] Further, the respondent must have some interest in the subject matter of the declarations, *ie*, the Pardon granted in this case, or some rights against the appellants. In this case, we are of the considered opinion that the respondent has none.

- H [18] We noted that the learned High Court Judge acknowledged that the respondent had no cause of action against the first appellant. Similarly, we are of the considered view that the respondent has no cause of action against the second appellant.

- I [19] In this case, the respondent's claim does not disclose a cause of action against the first appellant and/or the second appellant, the Pardons Board. The respondent has not pleaded any infringement of private or public rights or interest or special injury resulting from the Pardon granted to the first appellant. The respondent is clearly a busybody, a troublemaker and is not

entitled to the declarations sought. Simply being a Malaysian citizen and a lawyer does not accord him the requisite right to bring this frivolous suit. It is clearly an abuse of process and ought to have been struck out.

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[20] In *Government Of Malaysia v. Lim Kit Siang (supra)*, where the respondent was a complete stranger and had no interest nor had he been deprived of his rights, the Supreme Court held that his suit was not maintainable and he was not entitled to the remedy of declaration.

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Powers Of Clemency Of YDPA

[21] The respondent contended that the powers of the YDPA to pardon is only in respect of sentence and not conviction of the first appellant. However, no authority was adduced by the respondent to support that contention. We are of the considered view that there is nothing in art. 42 of the Federal Constitution which curtails or limits the powers of the YDPA to grant the Pardon to the first appellant. If the intention was to limit it to sentence only, it should have been clearly stated in the Federal Constitution. It is not for the court to add any words. We find that the plain words of the relevant article of the Federal Constitution do not exclude the granting of a pardon in respect of a conviction.

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[22] Our perusal of art. 42 of the Federal Constitution showed that the powers of mercy and clemency of the YDPA are extensive and encompasses both conviction and sentence.

E

[23] Under reg. 113 of the Prisons Regulations 2000, a person who has been convicted has the right to petition the YDPA for a pardon against conviction and sentence. Further, art. 48(1) and art. 25(1)(c) of the Federal Constitution refer to a “free pardon”.

F

[24] In the Singapore case of *JB Jeyaratnam v. The Attorney General* [1990] 2 CLJ 477; [1990] 3 CLJ (Rep) 643, the court at p. 654b held as follows:

Clearly, whether a conviction is subsequently considered good or bad, it remains a conviction unless it is removed by a free pardon from the President. Only such a pardon can remove the disqualification.

G

[25] Further guidance can be found in *Nik Hassan Nik Hussin & Anor v. PP* [1947] 1 LNS 74; [1948] 1 MLJ 74 where two out of five defendants appealed and their convictions quashed, recommendation was made to the Governor to grant the remaining three, a free pardon.

H

Locus Standi

[26] We are in agreement with this contention of the appellants that the learned High Court Judge erred in finding that the respondent had the necessary *locus standi* merely by virtue of being a member of the public and a lawyer. The learned High Court Judge erred in failing to apply the correct test in determining the issue of *locus standi*.

I

- A [27] In determining whether a particular litigant has the requisite *locus standi*, the test to be applied was stated in *Government Of Malaysia v. Lim Kit Siang* (*supra*). This is what Abdul Hamid Omar CJ held at p. 27:

B A litigant is said to have *locus standi*, in effect standing to sue in a court of law, if that court recognises his or her ability to institute and maintain proceedings before it. The question of standing is thus separate and distinct from questions of substantive merits and the legal capacity of the plaintiff. It follows, therefore, that a litigant may lack standing to bring a case which would succeed if brought by the right litigant.

C *Put in a nutshell, the law of standing to sue has two fundamental rules. First, apart from certain cases in which standing to sue is in the discretion of the court, the plaintiff must possess an interest in the issues raised in the proceedings. Second, where the private plaintiff relies on an interest in the enforcement of a public right and not a private right, standing will be denied unless the Attorney General consents to a relator action, or the plaintiff can demonstrate some special interest beyond that possessed by the public generally.* (emphasis added)

- D [28] We are of the considered view that the clemency process and the granting of the Pardon to the first appellant does not in way or manner affect the respondent's personal or legal or any rights or interests. Thus, the respondent has no standing or right to question the clemency process or the advice given to the YDPA or the granting of the Pardon to the first appellant
- E (See *Karpal Singh v. Sultan Of Selangor* [1987] 2 CLJ 342; [1987] CLJ (Rep) 686; [1988] 1 MLJ 64).

F [29] The respondent, being an advocate and solicitor does not enjoy any higher right or privileges than ordinary people in this case. The learned High Court Judge clearly erred and misdirected himself for such a finding. There is nothing in the Federal Constitution which imposes a duty on the second appellant or the YDPA to consult the respondent or accept his views.

G [30] For the respondent to found an action such as this, he must demonstrate that he has suffered some special damage by the granting of the Pardon and that he has a genuine private interest to protect (See: *Abdul Razak Ahmad v. Majlis Bandaraya Johor Bahru* [1995] 4 CLJ 339 and that he will benefit from the declarations (See *Lee Ngan Fong & Ors v. Gan Bo Tan & Ors* [2011] 1 LNS 770). From the evidence adduced, the respondent in this case has failed wholly in this respect. Accordingly, he has no *locus standi* to challenge the Pardon granted to the first appellant. It is the first appellant's

H personal rights and liberties that will be infringed if the declarations are granted.

Advice Of The Pardons Board

- I [31] The learned High Court Judge held that there was an issue to be tried as to the correctness of advice given by the second appellant and whether there was a written opinion given by the AG. We find that the learned High Court Judge clearly erred and misdirected himself on these issues as follows:

- (i) that the learned High Court Judge blatantly ignored the pertinent and binding decisions of the Federal Court and Supreme Court that held that it is not open for the court to examine the advice of the Pardons Board, the matter being non-justiciable. The courts here, and England have consistently held that there shall be no challenge to the decision-making process leading to a decision by the YDPA on such matters; A
- (ii) in *Superintendent Of Pudu Prison & Ors v. Sim Kie Chon* [1986] 1 CLJ 548; [1986] CLJ (Rep) 256; [1986] 1 MLJ 494, at p. 498, the court held as follows: B
- If any court were to accede to the contention advanced on behalf of the respondent on the lines indicated then it would in effect be countenancing the respondent's participation in the exercise of executive and prerogative power and virtually reactivating a concluded trial. *It follows sequentially that if it is open to the court to examine the advice of the Pardons Board there would then in effect be an extra-curial retrial and endless re-ventilation of every convicts case.* C
- (emphasis added) D
- (iii) in *Juraimi Husin v. Pardons Board Of State Of Pahang & Ors* [2002] 4 CLJ 529; [2002] 4 MLJ 529, the Federal Court held: E
- The effect of making the decision making process justiciable would have the same effect as having the decision itself justiciable. Consequently, any attempt to make the decision making process justiciable would indirectly make the decision itself justiciable.* Accordingly the decision making process of the decision by the Sultan of Pahang under art 15 of the Laws of the Constitution of Pahang read with art. 42 of the Federal Constitution, was not justiciable. F
- (emphasis added) G
- (iv) further, in *Karpal Singh v. Sultan Of Selangor* [1987] 2 CLJ 342; [1987] CLJ (Rep) 686; [1988] 1 MLJ 64, an originating summons was filed relating to an issue concerning the process of clemency, the court held that it was not mandatory for the YDPA to act on the advice of the Pardons Board. See p. 67B-G of the grounds of judgment, where the court held: H
- Clause (9) of Article 42 cited by Mr, Karpal Singh does not make it mandatory on the ruler to act on the advice.* It only makes it obligatory on the part of the Pardons Board as constituted under clause (5) of Article 42 constituting of special persons to consider a written opinion which the Attorney General may have delivered thereon before tendering advice. I
- (emphasis added)
- (v) we noted that the respondent did not adduce evidence of the advice given by the second appellant to YDPA and we can safely assume that the respondent has no knowledge of the advice. Thus, there is no basis for the respondent to contend that such advice is wrong. I

A [32] Across the straits, in Singapore, where the power of the President to grant clemency was exercised on the advice of the Cabinet, the court there held that the clemency process was not justiciable. See *Yong Vui Kong v. Attorney General* [2011] 1 SLR 1 at paras. 82 and 84, where the court held that the power to grant pardons was an Executive power which was highly discretionary in nature and this excluded any duty to act judicially. Further, the clemency process was a highly private process and the applicant had no right to see the materials which would be before the Cabinet when it advised the President.

C [33] Article 42(9) of the Federal Constitution provides:
Before tendering their advice on any matters, **a Pardons Board shall consider any written opinion which the Attorney General may have delivered thereon.** (emphasis added)

D [34] Thus, art. 42(9) of the Federal Constitution does not make it, mandatory for the AG to render a written opinion. As such, we are of the firm view that the learned High Court Judge assumed erroneously that there was no written opinion and that it did not support the Pardon. There is no basis for this erroneous assumption and in any event, that is not the respondent's pleaded case. Thus, it is not an issue to be tried.

E **Non-justiciable?**

F [35] In seeking a declaration that the Pardon granted by the YDPA to the first appellant is void, the respondent is mounting a challenge against the powers of clemency of the YDPA and is moving the court to review the exercise of the prerogative powers of the YDPA. The power of pardon has been accorded to the YDPA by art. 42 of the Federal Constitution which reads:

G Article 42(1):
The Yang di-Pertuan Agong has the power to grant pardons, reprieves and respites in respect of all offences which have been tried by court-martial and all offences committed in the Federal Territories of Kuala Lumpur, Labuan and Putrajaya and the Ruler or Yang di-Pertua Negeri of a State has the power to grant pardons, reprieves and respites in respect of all other offences committed in his State. (emphasis added)

H [36] Further, art. 181 of the Federal Constitution provides:
Subject to the provisions of this Constitution, the sovereignty, prerogatives, powers and jurisdiction of the Rulers ... as hitherto had and enjoyed shall remain unaffected.

I [37] The long and consistent established position of the law in Malaysia is that the prerogative power of the YDPA under art. 42 of the Federal Constitution is non-justiciable.

[38] In *PP v. Soon Seng Sia Heng & Other Cases* [1979] 1 LNS 81; [1979] 2 MLJ 170, the Federal Court held that the court had no jurisdiction to confirm or vary the decision of the YDPA. Suffian LP stated at p. 171F-G of the report as follows:

When considering whether to confirm, commute, remit or pardon, His Majesty does not sit as a court, is entitled to take into consideration matters which the courts bound by law of evidence cannot take into account and decides each case on grounds of public policy; such decisions are solely for the executive. We cannot confirm or vary them; we have no jurisdiction to do so. The royal prerogative of mercy, as recognised by its inclusion in Chapter 3 of Part IV of the Constitution, is an executive power – as in *Jamaica, Hinds v. The Queen*. (emphasis added)

[39] In *Chiew Thiam Guan & Ors v. Superintendent Of Pudu Prisons & Anor* [1983] 1 CLJ 278; [1983] CLJ (Rep) 92; [1983] 2 MLJ 116, the Federal Court held that:

The Courts are without jurisdiction to deal with this sort of application for the reason that mercy is not the subject of legal rights.

[40] Further, in *Sim Kie Chon v. Superintendent Of Pudu Prisons & Ors* [1985] 2 CLJ 449; [1985] CLJ (Rep) 293 the Supreme Court *inter alia* held:

A decision made pursuant to an exercise of royal prerogative of mercy cannot be varied or confirmed by the courts there being no jurisdiction to do so.

[41] At p. 387 of the same case, the Supreme Court said:

In our judgment proceedings in Court aimed at questioning the propriety or otherwise of such a decision are therefore not justiciable ... *It is our considered view that the power of mercy is a high prerogative exercisable by the Yang Dipertuan Agong or the Ruler of a State or the Yang di-Pertuan Negeri, as the case may be, who acts with the greatest conscience and care and without fear of influence from any quarter.* (emphasis added)

[42] Further, in *Superintendent Of Pudu Prisons v. Sim Kie Chon (supra)*, the Supreme Court held:

the power of pardon or otherwise to mete out clemency is an executive power and in the Federal Constitution the royal prerogative of mercy is expressly preserved by Article 42 of the Constitution and is recognised by its inclusion on Chapter 3 of Part IV of the Constitution as an executive power. **When the Constitution has empowered the nation's highest executive as the repository of clemency power, the court cannot intervene and judicial review is excluded by implication.** (emphasis added)

[43] Similarly, in *Juraimi Husin v. Pardons Board State Of Pahang (supra)*, the Federal Court held that the royal prerogative of mercy and the decision-making process was not amenable to judicial process.

- A [44] Further support can be found in the English case of *Council Of Civil Service Unions & Others v. Minister For The Civil Service* [1984] 3 All ER 935, where at p. 956, per Lord Roskill said as follows:
- Prerogative powers such as those relating to the prerogative of mercy ... are not, I think, susceptible to judicial review because their nature and subject matter is such as not to be amenable to the judicial process.
- B [45] The case of *Sim Kie Chon v. Superintendent Of Pudu Prisons (supra)*, was cited with approval by the Federal Court in the recent case of *Letitia Bosman v. PP & Other Appeals* [2020] 8 CLJ 147 at para. 130, where the court stated:
- C The power of pardon provided for under art. 42 of the Federal Constitution is, however, a prerogative of mercy exclusively vested in the YDPA or Ruler of any State in Malaysia.
- D [46] It is clear in his grounds of judgment that the learned High Court Judge in this case, blatantly ignored binding precedents when he held that the granting of pardon in Malaysia was not a royal prerogative and that it is definitely justiciable. We are of the further view that the learned High Court Judge was clearly wrong to ignore the doctrine of *stare decisis*. Further, there was no reason and basis for him, to depart from the long line of established binding precedents.
- E [47] The learned High Court Judge was bound to follow the judgments of the Federal Court and Supreme Court, whether he agreed with them or not. (See (i) *Metramac Corporation Sdn Bhd v. Fawziah Holdings Sdn Bhd* [2006] 3 CLJ 177; [2006] 4 MLJ 115, at paras. 45 and 46; and (ii) *Periasamy Sinnappan v. PP* [1996] 3 CLJ 187; [1996] 2 MLJ 557, at p. 582(C-E).
- F [48] The power to grant pardons can only be exercised by the YDPA personally and exclusively and such exercise is not justiciable. There is no basis for the respondent in this case to impugn the YDPA's exercise of his exclusive power to grant the Pardon. See: *YAM Raja Dato' Seri Hj Izzuddin Iskandar Shah Ibni Almarhum Sultan Idris A'fifullah Shah v. Dewan Negara Perak, Negeri Perak & Anor* [2010] 2 CLJ 767.
- G [49] The respondent sought to have the Pardon granted by the YDPA to the first appellant to be declared void. However, the respondent has failed to plead any averments in the respondent's pleading or affidavit nor was any evidence adduced that in granting the Pardon to the first appellant, the YDPA acted beyond his statutory powers or in bad faith. Thus, we are of the considered opinion that there was no basis to impugn the Pardon granted and no reasons for the learned High Court Judge to make the findings, he did.
- H [50] Further, even if the respondent had the necessary *locus standi* and the matter was justiciable, the correct mode of challenge would have been by judicial review within the three months' time frame provided under the rules, and not by writ.
- I

[51] In *Lim Cho Hock v. Government Of The State Of Perak, Menteri Besar, State Of Perak And President, Municipality Of Ipoh* [1980] 1 LNS 43; [1980] 2 MLJ 148, the court held that: A

The court's power to make declaratory judgments is confined to matters justiciable in the courts, and the binding declarations which it could make under Order 15 rule 16 of the Rules of the High Court, 1980 are limited to legal or equitable rights and do not extend to moral, social and political matters. B

Conclusion

[52] In conclusion, we are of the considered opinion that for the court to even consider granting declaratory relief, the following requirements must be satisfied namely: C

- (i) the court must have the jurisdiction and power to grant the remedy;
- (ii) that the matter must be justiciable in court; and
- (iii) the plaintiff must have *locus standi* to bring the suit and there must be a real controversy for the court to resolve. D

[53] In the light of our above findings after having considered the findings and reasons given by the learned High Court Judge in dismissing the striking out applications of the first and second appellants, we are of the considered opinion that the learned High Court Judge made serious errors and misdirection in material findings of the law and facts which warranted appellate intervention. E

[54] Further, in the light of our above findings, we are of the considered view that there are no serious triable issues to be tried in this case and that the respondent's claim is frivolous and an abuse of the process of court. F

[55] In the premises, we are of the respectful view that there are merits in the first and second appellants' appeals. The prerogative of mercy can only be exercised by the YDPA and not caught within the supervisory jurisdiction of the courts. Thus, the respondent's suit is clearly unmaintainable and an abuse of process. In the premises, we unanimously allow the appeals with no order as to costs. G

[56] The order of the High Court dated 21 September 2021 is set aside and that the respondent's writ and amended statement of claim be struck out. H

I